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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

CARRIE FERRARA CLARK,

Plaintiff,

vs.

CITY OF TUCSON,

Defendant.

No. CV-14-02543-TUC-CKJ

**PLAINTIFF’S CROSS-MOTION FOR  
SUMMARY JUDGMENT**

Hon. Cindy K. Jorgenson

Plaintiff Carrie Ferrara Clark submits her Cross-Motion for Summary Judgment on her Second Amended Complaint as follows.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. SUMMARY OF ARGUMENT**

Since October 27, 2012, the City of Tucson Fire Department (TFD) has subjected Plaintiff Carrie Clark to a pattern of unlawful conduct that constitutes sex discrimination and retaliation under the Fair Labor Standards Act (FLSA) and Title VII of the Civil Rights Act of 1964 (Title VII). Considering the record evidence in this case, there is no dispute of material fact that TFD lacked a policy or plan for how to comply with federal law governing nursing mothers under the Patient Protection and Affordable Care Act (PPACA). There is also no dispute of material fact that TFD could have, but refused to, provide Mrs. Clark with an assignment to a fire station that complied with the PPACA so she could express breastmilk in a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public. Further, there is no dispute of material fact

1 that TFD retaliated against Mrs. Clark for raising and pursuing the lack of proper lactation  
2 space through her chain of command (all the way to the Fire Chief himself), and for filing  
3 an EEO complaint regarding TFD's discrimination. There is also no dispute that TFD failed  
4 to take steps to prevent the retaliation from continuing. Finally, there is no contested issue  
5 of material fact that TFD created a severe, pervasive, hostile work environment for Mrs.  
6 Clark by both its malfeasance and nonfeasance in this case. For these reasons, Mrs. Clark is  
7 entitled to summary judgment on all of her federal claims.<sup>1</sup>

## 8 **II. STANDARD OF REVIEW**

9 Rule 56 of the Federal Rules of Civil Procedure provides that "the court shall grant  
10 summary judgment if the movant shows that there is no genuine dispute as to any material  
11 fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If the  
12 party moving for summary judgment is the party that would bear the burden of persuasion  
13 at trial, "that party must support its motion with credible evidence... that would entitle it to  
14 a directed verdict if not controverted at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 331  
15 (1986). The moving party may rely on "portions of 'the pleadings, depositions, answers to  
16 interrogatories, and admissions on file, together with the affidavits, if any,'" to demonstrate  
17 the absence of an issue of material fact that would require a trial. *Id.* at 323. If there is not  
18 sufficient evidence "favoring the nonmoving party for a jury to return a verdict for that  
19 party," then there is no issue of material fact and summary judgment should be granted in  
20 favor of the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

## 21 **III. LEGAL ARGUMENT**

### 22 **A. TFD Violated Section 207(r) of the Fair Labor Standards Act When it 23 Failed To Provide Legally Compliant Space for Mrs. Clark to Express 24 her Breastmilk**

25 In this case, the record evidence indicates that TFD failed to provide legally  
26 mandated lactation facilities for Mrs. Clark to express breastmilk for her newborn son.

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<sup>1</sup> Plaintiff moves to dismiss her state law claims in this litigation, Counts III – VI of her Second Amended Complaint, without prejudice.

1 Thus, Mrs. Clark's claim under FLSA § 207(r) succeeds as a matter of law. FLSA requires  
2 that an employer provide:

3 (A) a reasonable break time for an employee to express breast milk for her  
4 nursing child for 1 year after the child's birth each time such employee has  
need to express the milk; and

5 (B) a place, other than a bathroom, that is shielded from view and free from  
6 intrusion from coworkers and the public, which may be used by an employee  
to express breast milk.

7 29 U.S.C. § 207(r)(1).

8 The application and enforceability of § 207(r) have not been widely addressed by the  
9 Courts. *Hicks v. City of Tuscaloosa*, 7:13-CV-02063-TMP, 2015 WL 6123209, at \*28 (N.D.  
10 Ala. Oct. 19, 2015). However, several federal courts have held that § 207(r) creates a  
11 private cause of action for unpaid wages and overtime compensation related to an  
12 employer's failure to provide adequate break time or space for lactation. *See Id.* at 29; *Lico*  
13 *v. TD Bank*, 14-CV-4729 JFB AKT, 2015 WL 3467159, at \*3 (E.D.N.Y. June 1, 2015) ("To  
14 be clear, damages in a private suit under § 207(r) are limited to wages lost as a result of the  
15 employer's failure to provide an adequate space for lactation"); *Mayer v. Prof. Ambul., LLC*,  
211 F. Supp. 3d 408, 413 (D.R.I. 2016).

16 TFD admits that prior to July 19, 2013, it lacked a policy for complying with §  
17 207(r) by providing reasonable break time and private space for lactating mothers. Exh. X.  
18 ¶ 1; PSOF 8, 45. Office of Equal Opportunity Programs (OEOP) Investigator Matthew  
19 Larsen concluded that 9 of TFD's 21 fire stations, or 43%, did not have facilities suitable  
20 for the expression of breast milk, and thus were non-compliant with § 207(r). PSOF 56.  
21 TFD does not dispute that Mrs. Clark provided notice to her immediate supervisor of her  
22 need for lactation facilities prior to returning to work from maternity leave. PSOF 7, 128 ¶  
23 15. Further, TFD admits that when Mrs. Clark returned to work, she was placed on a  
24 "swing" shift, meaning that she was assigned to different stations each shift according to its  
25 staffing needs. PSOF 26, 128 ¶ 14. As a result of Mrs. Clark's status as a "swing"  
26 paramedic, there was a high likelihood that Mrs. Clark would be, and she in fact was,  
assigned several shifts at stations that were not in compliance with § 207(r). PSOF 31, 35.

1 As a result of being assigned to stations that were not equipped with mandated  
2 lactation spaces, Mrs. Clark was forced to expend vacation and sick leave days. PSOF 28. It  
3 is hardly a stretch to infer that TFD was laissez-faire about its approach to her assignments  
4 knowing that she could simply expend a benefit of employment (vacation or sick leave) if,  
5 in her “perception,” the station assignment was appropriate. PSOF 49, 54.

6 Since TFD failed to ensure that all of its stations contained adequate spaces for  
7 nursing mothers to express breast milk, and thus failed to comply with § 207(r), Mrs. Clark  
8 was forced to use paid time off to cover what should have been unpaid break time to  
9 produce milk for her son. Therefore, she was forced to work additional hours that could  
10 have been substituted for paid time off, essentially receiving no wages or overtime for those  
11 hours. Under the plain text of the FLSA and federal court precedent interpreting § 207(r),  
12 Mrs. Clark is entitled to recover her lost wages and overtime for those hours, and an  
13 additional equal amount in liquidated damages. 29 U.S.C. § 216(b). As no genuine issue of  
disputed material fact exists, Mrs. Clark’s motion for summary judgment should be granted.

14 **B. Ample, Unrebutted Direct Evidence Demonstrates that TFD Engaged in**  
15 **Prohibited Discrimination Against Mrs. Clark Due to her Status as a**  
16 **Breastfeeding mother**

17 In 1978, Congress amended Title VII with the Pregnancy Discrimination Act (PDA),  
18 which provides that discrimination “because of sex” or “on the basis of sex” includes  
19 discrimination on the basis of pregnancy, childbirth, or related medical conditions. 42  
20 U.S.C. § 2000e(k). Lactation or expressing milk states a cognizable Title VII sex  
21 discrimination claim. *Harper v. Thiokol Chemical Corp.*, 619 F.2d 489 (5th Cir. 1980).  
22 PDA cases are analyzed using the same framework as other Title VII discrimination cases.  
23 *See Armstrong v. Flowers Hospital*, 33 F.3d 1308, 1312-13 (11th Cir. 1994). Title VII  
renders the following employer conduct unlawful:

24 (1) to fail or refuse to hire or to discharge any individual, or otherwise to  
25 discriminate against any individual with respect to his compensation, terms,  
26 conditions, or privileges of employment, because of such individual's race,  
color, religion, sex, or national origin; or

1 (2) to limit, segregate, or classify his employees or applicants for employment  
2 in any way which would deprive or tend to deprive any individual of  
3 employment opportunities or otherwise adversely affect his status as an  
4 employee, because of such individual's race, color, religion, sex, or national  
5 origin.

4 42 U.S.C. § 2000e-2(a).

5 A plaintiff in a pregnancy discrimination case can prove a disparate treatment claim  
6 in two ways, by “direct evidence that a workplace policy, practice, or decision relies  
7 expressly on a protected characteristic” or indirectly, using the *McDonald Douglas* burden  
8 shifting approach. *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015). In this  
9 case, there is both direct and circumstantial evidence, neither of which are rebutted or  
10 disputed.

11 Direct evidence is ““evidence of the conduct or statements by persons involved in the  
12 decision-making process that may be viewed as directly reflecting the alleged  
13 discriminatory attitude...sufficient to permit the fact finder to infer that the attitude was  
14 more likely than not a motivating factor in the employer’s decision.”” *Everts v. Sushi*  
15 *Brokers LLC*, U.S. Dist. Az. (CV015-02066-PHX-JJT) (March 27, 2017)(quoting *Shelley v.*  
16 *Geren*, 666 F.3d 599, 615-16(9<sup>th</sup> Cir. 2012). Direct evidence “requires an admission by the  
17 decision-maker that his or her actions were based on the prohibited animus. Absent such  
18 remarks, a plaintiff must show a nexus between a decision-maker’s actions and a superior’s  
19 discriminatory remarks.” *Id.* (citing *Day v. LSI Corp.* 174 F.Supp.3d 1130, 1162(D. Ariz.  
20 2016); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9<sup>th</sup> Cir. 2003)

21 Before returning to work after having her first child, Mrs. Clark called Battalion  
22 Chief (BC) Paul McDonough to secure a long-term opening that would provide her with a  
23 consistent place to pump and express her breastmilk. She called BC McDonough because  
24 she knew that TFD did not have a policy that covered employees who were  
25 nursing/breastfeeding. PSOF 7-8. The only policy that TFD had on its books as of  
26 November 6, 2009, was deemed unlawful by its HR Manager, Joann Acedo. PSOF 8. Even  
though Station 20 appeared to comply with federal law, and she requested to be assigned  
there, TFD chose not to do so. PSOF 10-11, 13.

1 Station 12, where Mrs. Clark was working, had a private room shielded from view,  
2 though it did not have a lock on it so it would not have been completely free from intrusion  
3 from coworkers and the public. Nevertheless, Plaintiff was willing to try to make that space  
4 work. PSOF 16-17, 19. A co-worker offered to help her and asked to move to another  
5 station so that Mrs. Clark could stay at Station 12, which complied with PPACA  
6 requirements. PSOF 14-15.

7 BC McDonough subsequently brought Mrs. Clark to TFD headquarters to meet with  
8 Deputy Chief (DC) Ed Nied and DC Rob Rodriguez. During that meeting, DCs Nied and  
9 Rodriguez accused her of being disingenuous with her request – they believed she simply  
10 wanted to be closer to her mother, who would pick up breastmilk from Ms. Clark at work.  
11 They also suggested that Plaintiff should just take more time off from work and that they  
12 could not remember any other women in the past having the same issues with breastfeeding.  
13 PSOF 21. This accusation is direct evidence of discrimination. Ms. Clark gave the deputy  
14 chiefs no reason to doubt the sincerity of her request, which was for an accommodation that  
15 was reasonable.

16 TFD eventually denied the requests for assignment to Station 12 and put the  
17 assignment out to bid because it violated TFD's Rules of Assignment. PSOF 18, 22.

18 TFD, however, does not always follow its Rules of Assignment and often deviates  
19 from them. For example, TFD has accommodated employees who have received DUI  
20 convictions or other criminal charges, and for those who are on a work improvement plan.  
21 TFD has also granted assignment changes to its personnel to assist them in times of need.  
22 PSOF 24-25. Nevertheless, TFD continued to assign Mrs. Clark to non-compliant stations.  
23 PSOF 27. TFD assignment scheduler Rick L'Heureux told Captain Gordon Clark,  
24 Plaintiff's husband, "I don't think she deserves any special treatment." PSOF 27. This is  
25 also direct evidence of a workplace decision specifically relying on Ms. Clark's status as a  
26 breastfeeding mother. TFD offers no contrary evidence. As a result of the failure of TFD to  
provide Mrs. Clark with a consistent assignment to a station that complied with federal law,  
she often had to take vacation and sick leave. PSOF 28. The lack of a consistent assignment

1 where she knew she could express her breastmilk privately, free from intrusion, caused Mrs.  
2 Clark a great deal of stress and anxiety, which in turn affected her ability to produce an  
3 adequate supply of breastmilk for her son while she was on shift. PSOF 9, 14, 20, 28, 67.  
4 Consequently, her son did not gain weight as expected and was assessed by his doctor as  
5 being underweight. PSOF 32.

6 The situation reached a crescendo when on March 20, 2013, she was assigned to  
7 another station that did not have legally-compliant lactation space. When Ms. Clark spoke  
8 with then-Assistant Chief (AC) Michael Fischback, DC Rodriguez and HR Manager Acedo,  
9 about this problem, HR Manager Acedo told Ms. Clark that her pumping seemed excessive  
10 and that “it seems to me that you’re not fit for duty.” PSOF 35-41; PSOF 128 ¶ 43. During  
11 this call, HR Manager Acedo suggested that Mrs. Clark simply wake up her Captain (EC)  
12 or BC when she needed to express breastmilk. PSOF 37-38.

13 These insensitive, ignorant, discriminatory statements are also direct evidence of a  
14 workplace policy or management decision relying specifically on Ms. Clark’s protected  
15 status. AC Fischback would later agree that HR Manager Acedo’s suggestion was  
16 inappropriate. PSOF 39.

17 Nevertheless, when Mrs. Clark reacted to the ridiculousness of HR Manager Acedo’s  
18 suggestion (that she simply wake up her EC or BC in the middle of the night to pump) with  
19 colorful language (but without cussing), TFD decided to formally discipline Mrs. Clark.  
20 PSOF 58-59. TFD also accused Mrs. Clark of hanging up on them during the call, though  
21 the only evidence they have of this is that their phone line suddenly went dead. PSOF 60.

22 HR Manager Acedo chuckled to herself during the March 20, 2013, call because  
23 TFD had no idea how to handle Mrs. Clark’s simple request for legally-compliant lactation  
24 space. Ignorant as to the law at the time, she thought that it was simply a medical issue that  
25 should not be different than anything else. PSOF 45, 72. HR Manager Acedo thought that  
26 Mrs. Clark was simply upset over not receiving “special treatment” and that TFD was  
refusing to exercise its vested discretion over its Rules of Assignment. PSOF 24-25, 48.

1 The same day, TFD asked the City of Tucson (City) to install a privacy lock on one  
2 of the bedroom doors at Station 6 because that is where TFD was assigning Mrs. Clark.  
3 PSOF 50-51. When City workers were installing the lock, someone put a big note on the  
4 door that said, “Carrie Clark.” OEOP Program Manager Bob Barton took that to mean that  
5 “there’s going to be an uncomfortable issue with her.” PSOF 55. There is no record  
6 evidence that OEOP, TFD, or any other City entity did anything to address this obvious  
7 “uncomfortable issue” TFD had to deal with because Mrs. Clark sought to enforce her  
8 rights as a breastfeeding mother.<sup>2</sup> And that is exactly where TFD assigned Mrs. Clark – to  
9 Station 6, on the far southeast boundary of Tucson, on Wilmot & I-10, a station which  
10 primarily services state and federal prisons. PSOF 61. Despite inquiring about working  
11 overtime and the ability to trade shifts on her special assignment, TFD never responded.  
12 Therefore, TFD deprived Mrs. Clark of overtime and shift-trading opportunities. PSOF 63.

13 Five months after Mrs. Clark first raised the fact that TFD did not have adequate,  
14 legally-compliant spaces for nursing mothers, the City’s Equal Opportunity Programs  
15 Division (EOPD) Investigator Matthew Larsen produced findings that 43% (or 9 of 21) of  
16 TFD’s fire stations did not comply with federal law. PSOF 56. Further, TFD did not even  
17 have a process or policy in place where employees can even request assignments for unique  
18 circumstances. PSOF 56-57.

19 At the same meeting that TFD formally disciplined Mrs. Clark, she asked why she  
20 could not work at Station 12. AC Fischback said that Station 12 was not on TFD’s list of  
21 stations that were in compliance. When Mrs. Clark pointed that out that the only other  
22 nursing mother in TFD was at Station 12, AC Fischback replied, “Well, that’s what happens  
23 when you file a complaint with EEO.” Mrs. Clark pointed out that she had no filed a

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24 <sup>2</sup> That was, unfortunately, the attitude of many TFD and City employees. OEOP Program  
25 Director Barton thought this was a matter of Mrs. Clark’s “perception” – not TFD’s  
26 responsibility to follow federal laws prohibiting discrimination against breastfeeding  
mothers, providing them with private lactation spaces, and to ensure that its employees  
were not subjected to a hostile work environment as a result. PSOF 54.

1 complaint; AC Fischback retorted that someone had gotten them involved. PSOF 64. This is  
2 more direct evidence of discrimination (as well as abject reprisal.)

3       Instead of acknowledging that not having legally-compliant nursing spaces in its  
4 stations was a problem that needed to be resolved, TFD made Mrs. Clark the scapegoat,  
5 singling her out at every possible turn. BC McDonough referred to Mrs. Clark's request as  
6 her "specific needs" and that they were working to "ensure her needs were met..." PSOF  
7 68. When TFD issued a new nursing rooms policy eight months after Mrs. Clark first raised  
8 the issue, it was widely referred to as the "Carrie Clause" or the "Carrie Rule." PSOF 70,  
9 74. And when the Clarks brought this offensive label to the attention of management, they  
10 closed the investigation, blaming them for not 'naming names' of the offending characters  
11 (which the Clarks dispute.) PSOF 81-83. This despite the fact that on August 1, 2013 AC  
12 Brad Olson sent an email to TFD management acknowledging that calling the policy the  
13 Carrie Clause was negative. PSOF 71.

14       There is no dispute of material fact that TFD's ad-hoc, seat-of-its-pants approach to  
15 assigning Mrs. Clark after she returned from maternity leave was discriminatory. PSOF 68-  
16 69. Even after its nursing room policy was in place, TFD continued to harass Mrs. Clark  
17 with uncertainty and mixed messages about her assignments. PSOF 77-78, 81, 86-87. There  
18 is plentiful direct evidence that TFD's workplace policies (or lack thereof), its practices,  
19 and its decisions relied solely on Mrs. Clark's protected characteristic. *Young, supra*, 135.  
20 S.Ct. at 1345. Further, the undisputed evidence demonstrates that Mrs. Clark was subjected  
21 to numerous adverse employment actions, defined as acts that materially affect the terms,  
22 conditions, or privileges of employment." *Weeks v. Union Pac. R.R. Co.*, 137 F. Supp. 3d  
23 1204, 1216-17 (E.D. Cal. 2015). Summary Judgment is therefore appropriate on Mrs.  
24 Clark's Title VII claims.

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1           **C. Direct Evidence in this Case Demonstrates TFD Subjected Mrs. Clark to**  
2           **a Hostile Work Environment so Severe and Pervasive that, as a Matter**  
3           **of Law, she has Clearly Suffered Discrimination Under Title VII**

4           No genuine issue of material fact exists to dispute that TFD subjected Mrs. Clark to a  
5 pattern of harassment based on her status as a nursing mother that was so severe and  
6 pervasive as to constitute hostile work environment discrimination. “A claim of ‘hostile  
7 environment’ sex discrimination is actionable under Title VII.” *Meritor Sav. Bank, FSB v.*  
8 *Vinson*, 477 U.S. 57, 73 (1986). Two elements are required: 1) conduct that is “severe or  
9 pervasive enough to create an objectively hostile or abusive work environment—an  
10 environment that a reasonable person would find hostile or abusive;” and 2) the victim must  
11 “subjectively perceive the environment to be abusive.” *Harris v. Forklift Sys., Inc.*, 510  
12 U.S. 17, 21-22 (1993). Significantly, a hostile work environment need not “seriously affect  
13 employees’ psychological well-being,” rather, conduct that “can... detract from employees’  
14 job performance, discourage employees from remaining on the job, or keep them from  
15 advancing in their careers,” is sufficient to establish a hostile work environment claim. *Id.*  
16 at 22.

17           The record evidence in this case overwhelmingly supports the claim that Mrs. Clark  
18 suffered through a hostile work environment based on her status as a nursing mother in  
19 violation of Title VII. Mrs. Clark’s decision to express breast milk for her newborn son for  
20 the first year after his birth was questioned, derided, minimized, dismissed, and ridiculed at  
21 every turn. PSOF 21, 27, 31, 36-41, 45-48, 54-55, 64, 68, 73, 74, 76, 84.

22           When Mrs. Clark returned to work after maternity leave for her second child, the  
23 hostile work environment discrimination worsened. In June or July 2014, Mrs. Clark  
24 promoted to a position in TFD’s Fire Prevention Division (Fire Prevention). PSOF 98.  
25 Captain Jeff Langejans then began a pattern of harassing conduct against Mrs. Clark that  
26 included telling his subordinate that it would be easy to kill his enemies, spreading negative  
rumors about Mrs. Clark’s marriage, sharing negative comments about Mrs. Clark posted to  
an online article about Mrs. Clark’s lawsuit, disparaging Mrs. Clark as the reason for poor  
morale in Fire Prevention, claiming the Clarks were ruining Fire Prevention, accusing her

1 of cheating on her promotional test to his subordinates, and making threatening and  
2 derogatory remarks about Mrs. Clark and female firefighters generally. PSOF 98-116.

3 TFD admits that Fire Prevention Inspectors Tom Sisterman and John Vincent,  
4 subordinates of Captain Langejans, filed complaints which corroborated the hostile work  
5 environment in Fire Prevention created and caused by Captain Langejans' treatment of Mrs.  
6 Clark. PSOF 128 ¶ 107-109. While it investigated Captain Langejans' conduct, Captain  
7 Langejans received the equivalent of a slap on the wrist; he was never removed from his  
8 position or transferred to a different department. PSOF 118-119. When EOPD Investigator  
9 Larsen criticized TFD for letting Captain Langejans get off easy, TFD defended its actions.  
10 PSOF 121, 125. For these reasons, no genuine issue of material fact exists to dispute that  
11 TFD subjected Mrs. Clark to hostile work environment sex discrimination based on her  
12 status as a nursing mother.

13 The conduct that Mrs. Clark suffered both prior to and after her second maternity  
14 leave were both objectively hostile and abusive, as demonstrated by the fact that at least two  
15 other individuals who witnessed the conduct filed complaints for hostile work environment,  
16 and subjectively perceived by Mrs. Clark as hostile and abusive, as demonstrated by the fact  
17 that she lodged multiple internal and external complaints, both formal and informal. PSOF  
18 19, 29-30, 33-34, 74-75, 120. Summary judgment is also appropriate on this claim.

19 **D. Even Assuming, Arguendo, Direct Evidence Does not Support Title VII  
20 Discrimination or Hostile Work Environment, No Genuine Issue of  
21 Material Fact Exists to Dispute that she has Proven a Prima Facie Case  
22 Under the *McDonnell Douglas* Burden-Shifting Framework**

23 Where there is no direct evidence of discrimination, the Plaintiff bears the initial  
24 burden of establishing a prima facie case of discrimination by showing that she belongs to  
25 the protected class, she sought accommodation, that the employer did not accommodate her,  
26 and that the employer did accommodate others similar in the ability or inability to work.  
*Young, supra*, 135 S. Ct. at 1354. This is not an inflexible rule. *Id.* Actions by an employer  
from which can be inferred, absent an explanation, that the actions were more likely than  
not based on discriminatory criterion are illegal under Title VII. *Id.* The burden on the

1 plaintiff to state a prima facie case is “not onerous.” *Id.*, citing *Texas Dept. of Community*  
2 *Affairs v. Burdine*, 450 U. S. 248, 253 (1981).

3       There is no genuine dispute that Mrs. Clark is a member of a protected class, or that  
4 she sought accommodation in the form of a consistent assignment to a station that had a  
5 place, other than a bathroom, that was shielded from view and free from intrusion from  
6 coworkers and the public so she could express her breastmilk. There is also no genuine  
7 dispute that TFD failed to do so. PSOF 10-11, 13-22, 26-28, 35, 42, 45, 48, 64, 66, 74, 77-  
8 78, 81, 84, 86-87. The record evidence also shows that TFD admits that despite its excuses  
9 to Mrs. Clark that its Rules of Assignment did not allow for what Mrs. Clark was asking, it  
10 does not, in fact, follow its Rules of Assignment, and can make exceptions based on  
11 “management rights.” PSOF 23-24. TFD has deviated from its Rules of Assignment for  
12 employees who have been convicted of driving under the influence, charged with other  
13 criminal offenses, and employees whom are on a work improvement plan. PSOF 24. TFD  
14 also prohibited Mrs. Clark from being assigned to Station despite the fact that the only other  
15 nursing mother in TFD, Arianne Phaneuf, was assigned there. PSOF 64. Therefore, Mrs.  
16 Clark has established a prima facie case. Further, there is no record evidence that TFD has  
17 or can offer a legitimate, non-discriminatory reason for its disparate treatment of Mrs.  
18 Clark. PSOF 64. For these reasons, even under the *McDonnell Douglas* burden-shifting  
19 framework, Mrs. Clark is entitled to summary judgment.

20       **E.     TFD Retaliated Against Mrs. Clark in Violation of Title VII Both in its**  
21       **Treatment of her Husband and in Her Unfavorable Station**  
22       **Assignments.**

23       The record evidence in this case reflects that Mrs. Clark was subjected to retaliation  
24 when she complained of Captain Langejans’ hostile work environment discrimination  
25 outlined above. Title VII makes it unlawful for an employer to:

26       discriminate against any of his employees or applicants for employment ...  
because he has opposed any practice made an unlawful employment practice  
by this subchapter, or because he has made a charge, testified, assisted, or  
participated in any manner in an investigation, proceeding, or hearing under  
this subchapter.

1 42 U.S.C. § 2000e-3(a). It is well established that to “discriminate against” in the context of  
2 this statute refers to “distinctions or differences in treatment that injure protected  
3 individuals.” *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006). To  
4 establish a prima facie case for retaliation, a plaintiff must show: 1) she engaged in a  
5 protected activity; 2) her employer subjected her to an adverse employment action; and 3) a  
6 causal link exists between the protected activity and the adverse action. *Ray*, 217 F.3d at  
7 1240; *citing Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir.1994). An  
8 adverse employment action is any “adverse treatment that is reasonably likely to deter  
9 employees from engaging in protected activity.” *Id.* at 1240. The Ninth Circuit has taken a  
10 “broad” and “expansive” approach to determining the specific types of treatment that fit  
within that definition. *Id.* at 1241.

11 Over the course of several years, TFD retaliated against Mrs. Clark in numerous  
12 ways: by continually assigning her to non-compliant stations (PSOF 27, 33); by formally  
13 disciplining her (PSOF 58-59); by failing to address inappropriate, discriminatory,  
14 harassing behavior in TFD (PSOF 55, 70, 73-74); by refusing to assign her to Station 12  
15 (PSOF 15-18, 22, 64); by changing her start time while she was on light duty, forcing her to  
16 get a doctor’s note to exercise, and restricting where she could exercise (PSOF 94-96); by  
17 withdrawing time from her vacation bank without her consent (PSOF 97); by failing to  
18 adequately and properly address the hostile work environment in Fire Prevention (PSOF  
19 122); and when it used its investigation into Captain Langejans to justify transferring Mrs.  
20 Clark’s husband, Captain Gordon Clark, to a lower paying, less desirable position, under a  
nepotism policy that TFD does not otherwise enforce (PSOF 122-127).

21 On this last act of retaliation, Mrs. Clark was interviewed as part of TFD’s  
22 investigation into Captain Langejans’ conduct on January 22, 2015. PSOF 128 ¶ 108. This  
23 constitutes protected activity within the definition of Title VII because Mrs. Clark “testified,  
24 assisted, or participated in any manner in an investigation” into allegations of hostile work  
25 environment sex discrimination. 42 U.S.C. § 2000e-3(a). TFD then turned its investigation  
26 into Captain Langejans’ conduct into a finding that its nepotism policy was being violated

1 because Mrs. Clark and Captain Clark worked in Fire Prevention (though not in the same  
2 supervisory chain). *Id.* at ¶ 124; PSOF 122. TFD's transfer of Captain Clark to a lower-  
3 paying, more burdensome position is materially adverse and highly likely to discourage a  
4 reasonable employee from engaging in further protected activity. Thus, Captain Clark's  
5 transfer constitutes an adverse employment action under Title VII.

6 Temporal proximity between a protected activity and an adverse employment action,  
7 coupled with employer knowledge of the protected activity, raises a strong inference of  
8 unlawful retaliation. *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). Here, TFD's  
9 transfer of Captain Clark's was the result of Mrs. Clark's protected activity, as he was  
10 transferred as a result of the very proceeding in which she testified. PSOF 128 ¶ 124. This  
11 strong inference of retaliatory motive, based on temporal proximity and employer  
12 knowledge, coupled with the egregious nature of the adverse employment action  
13 demonstrates that TFD has violated Title VII's anti-retaliation provision. As no genuine  
14 issue of disputed material fact exists on TFD's retaliation, summary judgment is  
appropriate.

15 **F. TFD Violated Section 215 of the Fair Labor Standards Act When it**  
16 **Transferred Mrs. Clark to an Undesirable Location in Retaliation for**  
17 **Reporting That TFD Lacked Legally-Compliant Space to Express Her**  
**Breast Milk**

18 The undisputed record evidence shows that Mrs. Clark complained to OEOP that she  
19 was not being properly accommodated for her need to express breast milk under FLSA §  
20 207(r). As a result of her complaint, Mrs. Clark was transferred to Station 6, an undesirable  
21 work location, and deprived of the opportunity to earn overtime pay. PSOF 61, 63. FLSA §  
215 states, in relevant part:

22 It shall be unlawful for any person--to discharge or in any other manner  
23 discriminate against any employee because such employee has filed any  
24 complaint or instituted or caused to be instituted any proceeding under or  
25 related to this chapter, or has testified or is about to testify in any such  
proceeding, or has served or is about to serve on an industry committee.

26 29 U.S.C. § 215(a)(3).

1 An employee who has complained about violations of FLSA to her employer is protected  
2 from retaliation under § 215. *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999). To  
3 establish a prima facie case for retaliation under FLSA, a plaintiff must demonstrate: (1) he  
4 or she engaged in activity protected by the FLSA; (2) he or she suffered an adverse action  
5 by the employer subsequent to or contemporaneous with such employee activity; and (3) a  
6 causal connection existed between the employee's activity and the employer's adverse  
7 action. *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 103 F. Supp. 2d 1180, 1184  
8 (N.D. Cal. 2000). The burden then shifts to the defendant to offer a legitimate reason for the  
9 adverse employment action. *Id.* If the defendant is able to proffer a legitimate reason, the  
10 burden shifts back to the plaintiff to prove that the defendant's proffered legitimate reason  
11 is false and therefore mere pretext. *Id.* The term 'adverse employment action' is interpreted  
12 broadly. *Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000) (in the retaliation context,  
13 lateral transfers of the same pay and status, exclusion from meetings and seminars, moving  
14 to a less desirable workspace, and disadvantageous transfers all fall within the definition of  
adverse employment action.)

15 Based upon the undisputed facts of this case, it is clear that TFD retaliated against  
16 Mrs. Clark for her complaints that she was not being accommodated as mandated by FLSA.  
17 Mrs. Clark met with OEOP Specialist Marty Macias on January 7, 2013, alleging that she  
18 was not being provided with an acceptable location to express breast milk. PSOF 29-30, 34,  
128 ¶ 36. This constitutes a protected activity within the definition of § 215(a)(3).

19 TFD then assigned Mrs. Clark to work at Station 6, a station located at the far  
20 southeast boundary of Tucson that primarily responds to calls from the federal and state  
21 prisons. PSOF 61, 128 ¶ 53, 64. Mrs. Clark's assignment to Station 6 also resulted in her  
22 being deprived of the opportunity to earn overtime hours and make trades. PSOF 63. Thus,  
23 TFD subjected Mrs. Clark to an adverse employment action when she was transferred to  
24 Station 6, as it was a less convenient and less desirable assignment, and she was also  
25 deprived of the potential to earn overtime.



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